

<sup>1</sup> The respondent denied timely notice. Implicit in the ALJ's Order is a finding that timely notice was provided.

horseplay had become a regular incident of employment his injuries are compensable. Claimant further argues he told his supervisor about the incident three days after it occurred and thus provided timely notice.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is undisputed that on April 22, 2005, the claimant was sliding windows into a holding bin for a specific job when Charlie Presnal, a co-worker, pushed the claimant and the claimant grabbed Charlie Presnal and they both fell to the ground. The claimant alleged he injured his ankle in the fall but he finished work that day.

The preponderance of the evidence establishes that Charlie Presnal frequently engaged in pushing, shoving, taunting, throwing objects and other instances of horseplay while at work. Claimant would reciprocate on occasion when the activity was directed towards him. In short, the evidence established that everyone at respondent's workplace was aware of such activities, including respondent's manager. The co-workers testified that, in particular, Charlie Presnal's horseplay occurred so often that it cannot be denied it was considered a regular incident of employment. Moreover, Gary Presnal, the manager of the facility and also Charlie Presnal's father, was aware of the activity and did not follow the company policy to progressively discipline those who engaged in prohibited horseplay.<sup>2</sup>

Injury caused by horseplay does not normally arise out of employment and is not compensable. But if it is shown that the horseplay has become a regular incident of the employment and is known to the employer then injuries suffered in such activities are compensable.<sup>3</sup>

The claimant has met his burden of proof to establish that horseplay had become a regular incident of employment and respondent was aware of such activity. Accordingly, the ankle injury suffered in the incident on April 22, 2005, is compensable.

The claimant testified he told Gary Presnal about the incident and was advised to not file a workers compensation claim and instead submit the claim for treatment to health insurance as well as seek short-term disability. Claimant testified he was afraid he would lose his job if he did not comply with those directions. Claimant testified he had once complained to Gary Presnal's supervisor about the ongoing horseplay and afterwards had

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<sup>2</sup> Gary Ross Presnal Depo., Ex. 1.

<sup>3</sup> See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 P. 372 (1919).

been the subject of threats of loss of his job if he again went over Gary Presnal's head with complaints. Conversely, Gary Presnal denied he told claimant to fabricate a story about the cause of his leg injury.

The Board finds the ALJ, in finding claimant was entitled to benefits, had to conclude that claimant's testimony was truthful. The ALJ had the opportunity to evaluate claimant because he testified in person at the preliminary hearing. In circumstances such as this, where there is conflicting evidence, the Board finds it is appropriate to give some deference to the ALJ's conclusions. The Board concludes that claimant's testimony establishes he provided timely notice. Moreover, it was undisputed an incident occurred at work and Curtis D. Murphy, a co-worker, who observed the incident, confirmed claimant injured his ankle in the incident. Consequently, the Board affirms the ALJ's decision.

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated November 1, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this 30th day of December 2005.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director